

Remarks

In our response dated July 5, 2006, we submitted a Rule 1.131 affidavit by the assignee's in-house counsel, Curt Dodd, as the inventor is no longer employed by the assignee.

The Examiner rejected the affidavit as it was not made by the inventor, and made the rejection final.

In response to the final rejection, the applicant submits a Declaration made by the inventor, which recites essentially the same facts in the prior filed affidavit.

Applicant submits that the enclosed Declaration should be accepted after final pursuant to 37 CFR 1.116 (e) based on the following showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented.

The evidence is necessary as the previous affidavit has been rejected, and the facts are necessary to establish that the cited references do not qualify as prior art. We repeat that the substantive facts are the same. Thus, the facts were earlier presented.

A declaration by the inventor was not previously submitted as the inventor is no longer employed by the assignee.

Thus the enclosed Declaration was not previously presented as it was honestly believed by the undersigned that it would suffice to overcome the rejection, and that it would be accepted by the USPTO.

In addition, we submit that there is no undue burden on the Examiner in accepting the Declaration, as the facts in the present Declaration and the previously filed affidavit are substantially the same, and there is no requirement for the Examiner to conduct a further search, as the claims have not been amended

Furthermore, we submit that the Examiner should exercise his discretion in admitting the Declaration pursuant to 37 CFR 1.116 (e), as to do so places the application in condition for

allowance and is consistent with the policy stated in the section 706.07 MPEP regarding final actions. Quoting from that section of the MPEP:

"While the rules no longer give to an applicant the right to "amend as often as the Examiner presents new references or reasons for rejection," present practice does not sanction hasty and ill-considered final rejections. *The applicant who is seeking to define his or her invention in claims that will give him or her the patent protection to which he or she is justly entitled should receive the cooperation of the Examiner to that end, and not be prematurely cut off in the prosecution of his or her application.* But the applicant who dallies in the prosecution of his or her application, resorting to technical or other obvious subterfuges in order to keep the application pending before the primary Examiner, can no longer find a refuge in the rules to ward off a final rejection.

The Examiner should never lose sight of the fact that in every case the applicant is entitled to a full and fair hearing, and that a clear issue between applicant and Examiner should be developed, if possible, before appeal. However, it is to the interest of the applicants as a class as well as to that of the public that prosecution of an application be confined to as few actions as is consistent with a thorough consideration of its merits.

Neither the statutes nor the Rules of Practice confer any right on an applicant to an extended prosecution; *Ex parte Hoogendam*, 1939 C.D. 3, 499 O.G.3, 40 USPQ 389 (Comm'r Pat. 1939)." (emphasis added)

We respectfully submit that the applicant is not dallying to keep the application pending before the Examiner, and is not trying to extend prosecution. Indeed, both our previously filed affidavit, and the current response are a bona fide effort to address all of the issues in the rejection to obtain a Notice of Allowance and close prosecution. Furthermore, it is submitted that it is proper to admit the Declaration, as to *not* do so will force the applicant to file a RCE, which will unnecessarily extend prosecution without a thorough consideration of its merits.

As argued in our prior response, the facts stated demonstrate conception plus diligence by the applicant thereby removing the references.

Thus, it is submitted that, Declaration, which serves to remove the references, places the application in condition for allowance, and should be admitted. Accordingly, once admitted, it is submitted that the application in condition for allowance and a Notice of Allowance is hereby requested.

No fee is believed due for this submission. However, Applicant authorizes the Commissioner to debit any required fee from Deposit Account No. 501593, in the name of Borden Ladner Gervais LLP. The Commissioner is further authorized to debit any additional amount required, and to credit any overpayment to the above-noted deposit account.

Respectfully submitted,

AZAD, Mina

/Jeffrey M. Measures/

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